Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOHN L. REYNOLDS,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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THE DAILY RECORD

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QUESTIONS PRESENTED

1. Were petitioner's rights to a trial by jury and due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution denied by the New York State courts' erroneous application of the law with respect to circumstantial evidence?

2. Was petitioner's right to be present at trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution violated?

3. Did the trial court violate petitioner's rights to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution by refusing to recuse itself from the hearing on petitioner's motion to set aside the verdict?

4. Did juror misconduct during deliberations violate petitioner's constitutional rights to a fair trial?

5. Is petitioner's conviction supported by legally sufficient evidence as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

John L. Reynolds, Petitioner
People of the State of New York, Respondent

PARENT AND SUBSIDIARY COMPANIES

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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JURISDICTION OF THIS COURT

The order of the New York State Court of Appeals denying petitioner's application for leave to appeal to that Court from the order of the Appellate Division, Fourth Judicial Department, affirming his conviction was filed on June 2, 2000 (A-1). Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 13 of the Rules of this Court, as this is a final judgment reviewed by the highest court of New York in which review could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law §20.00 -
Criminal Liability for Conduct of Another

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

New York Penal Law §125.15 -
Manslaughter in the Second Degree

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or
2. He commits upon a female an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05; or
3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a class C felony.

New York Penal Law §330.30 -
Motion to Set Aside Verdict; Grounds for

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court;
2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or
3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his

part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

New York Criminal Procedure Law §270.35 - Trial Jury; Discharge of Juror; Replacement by Alternate Juror

If at any time after the trial juror has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service, or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial, the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 280.10.

STATEMENT OF THE CASE

On November 30, 1995, petitioner and seven co-defendants were charged by a Cattaraugus County grand jury with murder in the second degree [Penal Law §125.25(a)], manslaughter in the first degree [Penal Law §125.20(1)], manslaughter in the second degree [Penal Law §125.15(1)], assault in the first degree [Penal Law §120.10(1)], and assault in the second degree [Penal Law §120.25(2)] arising out of the beating

death of Kevin King. Each of the co-defendants pled guilty prior to trial, but petitioner chose to exercise his trial rights.

The events relevant to this case occurred on October 22, 1994 at the East Side Pizzeria in Olean, New York. At approximately 2:30 a.m., petitioner John Reynolds entered the pizzeria along with a number of other young men and women. They took seats at two tables near the front window of the restaurant. A few minutes later, decedent Kevin King and two friends – Steven Hellwig and Kevin Kenyon – walked in. Words were exchanged between the two groups and, ultimately, Hellwig and Kenyon challenged the group John Reynolds was with to a fight outside the restaurant. The People maintained that in response to this challenge petitioner said, "Are we going to take this shit?", but the identity of the individual who uttered this statement was vigorously disputed at trial.

Reynolds and his friends followed King, Hellwig and Kenyon into the parking lot of the pizzeria. While two of the thirteen witnesses to the events at the pizzeria that evening testified that John Reynolds exited the restaurant ahead of his friends, one of those witnesses – waitress Gail Wheeler – acknowledged that on the way out Reynolds told her that he was going outside to speak to Steven Hellwig, who was the brother-in-law of Reynolds's sister.

The descriptions of the physical confrontations in the parking lot of the East Side Pizzeria varied from witness to witness, but one important fact remained constant: in this wholly circumstantial case, not a single witness saw John Reynolds strike, punch or kick anyone, much less the decedent, Kevin King. Petitioner's only mistake was being present in an area where fights were occurring.

Not so with petitioner's co-defendants. Each of them was specifically identified as an attacker of Kevin King. In fact, Shawn Appleby quite frankly admitted that he punched out Kevin

Kenyon and King. As he left the East Side Pizzeria, Appleby saw Kenyon standing on the sidewalk facing him, with Hellwig and King behind him. When Kenyon put his hands in the air and said, "Are you ready to go?", Appleby punched him so hard that Kenyon fell to the ground. Appleby then moved past Kenyon to get at Hellwig and King. When those two separated, he went after King and landed a powerful blow to the area of King's mouth, causing King to "crumple" to the ground near the driver's side front quarter panel of a red pickup truck. Appleby saw his brother, Shane, also take a swing at King, but did not know if he, too, connected. King ultimately died as a result of injuries sustained during the altercation.

As he stood over Kevin King, Appleby saw Kenyon lying partially on the sidewalk and Hellwig in a fight immediately in front of the red pickup truck. In the approximately seven foot distance between Appleby and the front of the truck, several people were fighting. When Hellwig came toward him, Appleby knocked him to the ground with a single punch.

Steven Hellwig explained that he had approached petitioner outside the pizzeria to ask what was going on and, as petitioner started to answer, another guy came over petitioner's shoulder and started hitting him. Hellwig was then surrounded by people who were punching him from every angle. He was pushed up against a pickup truck during the fight and several people continued to beat him. When the fight was over, Hellwig walked to the front of the truck and saw Kevin King laying on his stomach in the parking lot.

As Hellwig looked for his glasses around the front of the truck, a male in a tan sweater ran over and punched him in the head and others pushed him up against a car which was parked next to the pickup truck and beat him again. When this second confrontation ended, Hellwig was kneeling over King.

During questioning at the scene, Hellwig told police that he did not see petitioner do anything and, the next day, he also told his brother that he did not see petitioner involved in the fight. Hellwig testified at trial that he did not see petitioner fight with anyone and did not observe him to direct, encourage or command anyone to fight or aid anyone involved in the fight.

Shane Appleby also did not see John Reynolds in any physical altercation that evening. He recalled following Shawn out the door and seeing Shawn punch Kevin Kenyon to the ground before running over to Kevin King and hitting him. Shane also landed a blow on King and watched him fall to the ground in the parking lot. During the incident, Shane saw petitioner walking around another fight occurring between two vehicles near the corner of the restaurant, but did not see him take part in the melee.

Several other witnesses to the altercation outside the pizzeria testified variously to the seven co-defendants kicking and punching Kevin King, but absolutely no one saw petitioner strike, punch or kick anyone else or encourage anyone to do so. Indeed, eyewitness Pamela Brochu told State Police investigators the day after the incident that she saw four males and one female striking King and ultimately identified them as Keri Haggerty, Brian Mooney, Shawn Appleby, Shane Appleby and Matthew Sweatland. According to Brochu, the Appleby brothers were definitely kicking King. Brochu did not, however, see petitioner involved in the fighting outside the restaurant. She saw him only after the fight was over as he was getting into his pickup truck, and heard petitioner say, "I had nothing to do with this."

Waitress Gail Wheeler observed the fight and did not see John Reynolds strike, punch or kick anyone. The only time she saw him outside the pizzeria was as he was running away from the area of the fight after it broke up. Wheeler did not, however, see petitioner anywhere during the fight.

Not a single one of the many eyewitnesses to this incident testified that John Reynolds fought anyone or encouraged anyone else to fight. This is consistent with the statement petitioner gave the morning after the incident to the Cattaraugus County Sheriff's Department. Voluntarily appearing at the station house at 7:45 a.m., petitioner was interviewed by Lieutenant Detective Dennis John. In response to the detective's questions, petitioner described events inside the restaurant after Steven Hellwig arrived with Kevin Kenyon and another guy petitioner did not know. He explained that when he and his friends left the restaurant, "all hell broke loose." There were people fighting all over, but he did not get involved and could not say who was hitting whom. The fighting lasted about five minutes and he got into his pickup truck to leave after it was over. When the police arrived at the scene, petitioner parked his truck and told Officer Sean Obergfell what had happened.

Petitioner's trial was conducted before Cattaraugus County Court Judge Larry M. Himelein. Commencing on September 8, 1997, the trial concluded with the jury's verdict on September 17, 1997. The jury acquitted petitioner of murder in the second degree, assault in the second degree and assault in the third degree, but found him guilty of manslaughter in the second degree.

On January 29, 1999, petitioner was sentenced to an indeterminate period of incarceration of from four to twelve years. Notably, the maximum sentence imposed on the most culpable co-defendant -- who by his own admission beat the decedent severely -- was two and one-third to seven years.

On appeal to the New York State Supreme Court, Appellate Division, Fourth Judicial Department, petitioner raised six points, four of which are relevant to this Petition: (1) the trial court erred in refusing to charge that the evidence in this wholly circumstantial case must exclude to a moral certainty all reasonable hypothesis of innocence; (2) the trial court violated

petitioner's state and federal constitutional rights to be present at all critical stages of the trial and New York Criminal Procedure Law §270.35; (3) the trial court erred in refusing to recuse itself from petitioner's post-trial motion to set aside the verdict; and (4) juror misconduct during deliberations violated petitioner's state and federal constitutional rights to a fair trial (see petitioner's brief and reply brief on appeal to the Appellate Division, Fourth Judicial Department, in the Appendix at pages A-8 and A-161, respectively).

By Order and Decision dated February 16, 2000, the Appellate Division affirmed petitioner's conviction (Appendix at pages A-2 through A-6). The Court concluded that proof indicating that petitioner had urged his accomplices to commit the assault was direct evidence eliminating the need for a moral certainty charge with respect to the evaluation of a wholly circumstantial case. Further, the Appellate Division concluded that petitioner's right to be present during a conference leading to the court's discharge of a sworn juror was not violated because such a conference is not a critical stage of trial at which a defendant must be present (the Court also rejected petitioner's claim that New York Criminal Procedure Law §270.35 [governing discharge of a sworn juror] was violated). Finally, the Court rejected petitioner's claim that the trial court had improperly refused to recuse itself from his motion to set aside the verdict and found that the evidence adduced at the hearing on that motion established that the trial jurors were not subjected to any improper outside influence (Appendix at pages A-2 through A-6).

A timely application for leave to appeal was filed with the New York State Court of Appeals (Appendix at pages A-204 through A-239). Each of the foregoing claims was raised to New York's highest court of review. Leave to appeal was denied by the Honorable Carmen Beauchamp Ciparick by Order dated June 2, 2000 (Appendix at page A-1).

POINT I

PETITIONER'S RIGHTS TO A TRIAL BY JURY AND DUE PROCESS OF LAW, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WERE DENIED BY THE NEW YORK STATE COURTS' ERRONEOUS APPLICATION OF THE LAW WITH RESPECT TO CIRCUMSTANTIAL EVIDENCE

Recognizing that, in a wholly circumstantial case, an accused has the right to have the jury instructed that the inferences to be drawn from such evidence must exclude to a moral certainty every reasonable hypothesis of innocence, the New York State Supreme Court, Appellate Division, Fourth Judicial Department, concluded that the trial court had properly refused to charge the "moral certainty" instruction because the case contained a mixture of both direct and circumstantial proof. Petitioner asserts that the Appellate Division wrongly construed circumstantial evidence as direct evidence and that this error -- which was not reviewed on the merits by the New York State Court of Appeals -- deprived petitioner of his federal rights to a jury trial and due process of law.

As this Court observed in concluding that a petitioner's Sixth Amendment right to a jury trial was denied by the trial court's failure to give constitutionally adequate jury instructions concerning reasonable doubt, "[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 2081 (1993). This interrelationship was described in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995):

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Id. at 509-10, 115 S.Ct. at 2313 (citation and footnote omitted).

Encompassed by the concept of the conjoint protections offered an accused by the Fifth and Sixth Amendments is the recognition that the rules governing a jury's receipt of evidence must further these constitutional objectives. Brinegar v. United States, 338 U.S. 160, 174, 69 S.Ct. 1302, 1310 (1949) ["Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard"]. The States are bound by the Fourteenth Amendment to ensure that jury verdicts of guilty in criminal trials are arrived at by way of trial processes which defer to the demands of the Sixth Amendment. See, Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451 (1968) ["The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States"].

The constitutional stature of the reasonable doubt standard (In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 [1970]), is respected only by evidentiary rules which operate to further the jury trial and due process rights which justify the imposition of such a stringent burden of proof upon the Government. As this Court explained in Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112 (1981): "Jurors are

not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." Id. at 302, 101 S.Ct. at 1120. Petitioner submits that the New York State Supreme Court, Appellate Division, Fourth Judicial Department, committed error of constitutional magnitude when it misconstrued obviously circumstantial evidence as direct evidence obviating petitioner's state law based right to a charge in wholly circumstantial cases that such proof must exclude to a moral certainty all reasonable hypothesis of innocence. While petitioner recognizes that there is no federal constitutional right to such a circumstantial evidence charge, it is his contention that the federal due process protections which make real the Sixth Amendment right to a jury trial are no more than ghosts when the highest State court to review a judgment of conviction deprives the accused of important procedural protections he would otherwise have received had the Court not misunderstood a fundamental legal concept which transcends differences in constitutional analysis and, indeed, is not dependent upon any constitutional interpretation for its meaning.

In light of the entirely circumstantial nature of the proof against John Reynolds, defense counsel requested that the trial court instruct the jury that petitioner's guilt must be established to a moral certainty in accordance with the rule governing evaluation of circumstantial evidence (Record on Appeal at page 1442). The court, however, refused to render the requested instruction on the ground that direct evidence had been presented, obviating the need for such a charge (Record on Appeal at page 1481). Ultimately, the jury was not given even the minimal instruction on what circumstantial evidence is and how it is to be evaluated.[1]

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[1] The Appellate Division found petitioner's claim that the trial court erred in failing to give even a basic explanation of the nature of circumstantial evidence was not preserved even though trial counsel did request the moral certainty instruction which, of necessity, incorporates circumstantial evidence (see, e.g., CJI §9.05) (Appendix at page A-4). Petitioner submits that the need for an instruction on how to evaluate circumstantial evidence was inherent in trial counsel's request for the moral certainty instruction

Pursuant to New York Criminal Procedure Law §330.30, petitioner moved to set aside the verdict on the ground that a moral certainty charge should have been given. The trial court denied the motion, ruling again that direct evidence of petitioner's guilt was introduced at trial. The court reasoned that petitioner's alleged statement inside the restaurant – "Are we going to take this shit?" – constituted direct proof of John Reynolds reckless state of mind. The trial court also stated that "[t]here was further direct evidence that defendant then led a charge of ten people out the door to confront three people in the parking lot. Given the hostilities that had occurred inside, a reasonable jury could consider that conduct reckless" (Record on Appeal at pages 1811-12).

Petitioner raised the trial court's refusal to give a moral certainty charge again on appeal to the Appellate Division, Fourth Judicial Department maintaining that the proof against him was entirely circumstantial, including the alleged statement, "Are we going to take this shit?" (Appendix at pages A-52 through A-63 and A-169 through A-184). The People countered that the statement was direct evidence of his guilt. The Appellate Division ruled:

> There is no merit to defendant's contention that the court erred in refusing to charge the "moral certainty" test for evaluating circumstantial evidence. Evidence of defendant's guilt was not purely circumstantial (*see*, People v. Daddona, 81 N.Y.2d 990, 992; People v. Barnes, 50 N.Y.2d 375, 379-80). With respect to defendant's complicity, there was direct evidence (*see*, People v. Daddona, supra, at 992) establishing that defendant urged his accomplices to assault the three men (*see*, People v. Roldan, 88 N.Y.2d 826, 827; People v. Blount,

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and that the court's failure to give any guidance to the jury on this crucial issue should have been reviewed by the Appellate Division as a meritorious basis for reversal of petitioner's conviction.

> ___ A.D.2d ___ [decided Oct. 21, 1999]). A moral certainty instruction is not required merely because the proof with respect to any particular element -- here, intent -- is wholly circumstantial (*see*, People v. Johnson, 65 N.Y.2d 556, 561, *rearg denied* 66 N.Y.2d 759; People v. Miller, 255 A.D.2d 460, *lv. denied* ___ N.Y.2d ___ [decided Nov. 30, 1999] (Appendix at pages A-4 through A-5).

The Appellate Division, Fourth Department, misapprehended the nature of circumstantial evidence and its erroneous ruling denied petitioner due process of law by depriving him of an important jury instruction to which he would otherwise have been entitled had the true nature of the evidence at issue been apparent to the trial and appellate courts. The proof urged by the People and adopted by the Appellate Division as direct evidence of John Reynolds' guilt is actually a textbook example of circumstantial evidence. Indeed, as a leading treatise has explained:

> Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence also may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion. For example, a witness' testimony that he saw A stab B with a knife is direct evidence of whether A did indeed stab B. In contrast, testimony that A fled the scene of the stabbing would be circumstantial evidence of the stabbing (but direct evidence of the flight itself).

McCormick on Evidence §185, at 641-42 (4th ed. 1992).

Even if it is assumed that petitioner made the statement attributed to him – "Are we going to take this shit?" – that comment was not direct proof showing Reynolds was aware of and

consciously disregarded a substantial risk of death to Kevin King. As petitioner's counsel pointed out during argument of the CPL §330.30 motion:

> You can take that any way you want but [there are] three ways to manifest not taking this shit, Your Honor, and one way is to get out of there so you don't have to take this shit anymore. Number two is to say something back so that I'm not taking this shit, I'm giving it back to you. Third way is to kick the shit out of someone. There [are] three ways to do it and I submit that it requires an inference to figure out which way. And that's why the circumstantial evidence rule was necessary and something should have been given to them (Record on Appeal at page 1753).

The inherently circumstantial nature of this supposed proof of petitioner's encouragement of his accomplices to assault Kevin King and his friends is manifest. Even assuming that John Reynolds made this comment – certainly a subject of conflicting testimony and in no way conceded by petitioner – the mere utterance of such words does not directly establish any principal fact. The meaning of the statement depends on the inference one draws from it. In the absence of an inferential process, the statement exists only as a collateral fact without direct evidential value.

Significantly, in the case at bar, the People bore the burden of establishing beyond a reasonable doubt that John Reynolds was aware of and consciously disregarded a substantial risk of death to Kevin King or shared that particular mental state with others and solicited, requested, commanded, importuned or intentionally aided the conduct which created the substantial risk of death. The worst inference that can be drawn from the statement "Are we going to take this shit?" is that petitioner was encouraging some type of response to the challenge issued by Hellwig and Kenyon. Whether

such reaction was to be verbal or physical in nature cannot be inferred from the mere words attributed to petitioner. The inescapable conclusion, however, must be that this statement cannot be considered under any circumstances to be direct evidence that John Reynolds was aware of and consciously disregarded a substantial risk of death to Kevin King.

Indeed, even if the statement is properly attributable to petitioner, the circumstances in which the remark was made compel the conclusion that it cannot be considered direct evidence of his awareness and conscious disregard of a known substantial risk of death to Kevin King. For example, the statement was not made in reference to anything the decedent said. Rather, it was purportedly said in response to the challenges of Steven Hellwig and Kevin Kenyon. Moreover, the altercations outside the restaurant involved several people at different locations. A simple non-directing remark made inside a restaurant in response to comments made by individuals other than the decedent and uttered before the separate confrontations with Hellwig, Kenyon and King ever began cannot be considered direct evidence that petitioner knew of a substantial risk of death to Kevin King and consciously disregarded it or solicited others to engage in conduct knowing a substantial risk of lethality could be created by such behavior.

This Court has not hesitated to provide guidance where needed in the interpretation of certain legal concepts. See, e.g. McKay v. North Carolina, 494 U.S. 433, 440, 110 S.Ct. 1227, 1232 (1990) [addressing the meaning of the term "relevant" in state court capital sentencing proceeding]; see also, Williamson v. United States, 512 U.S. 594, 599-600, 114 S.Ct. 2431, 2434-35 (1994) [defining "statement" as used in Fed. Rule. Evid. 804(b)(3)]; Bridges v. Nixon, 326 U.S. 135, 142-44, 65 S.Ct. 1443, 1447-48 (1945) [interpreting the meaning of "affiliation" as used in the Immigration Act of 1918, 8 U.S.C. §137(f)].

Accordingly, petitioner respectfully requests that the Court grant certiorari to rectify this fundamental error in the assessment of circumstantial proof and, ultimately, that the Court remand this case to the Appellate Division, Fourth Judicial Department, for proceedings in light of, and consistent with, this Court's ruling on the nature of circumstantial evidence.

POINT II

PETITIONER'S RIGHT TO BE PRESENT AT TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED

Petitioner maintains that his right to be present during trial was violated by the Cattaraugus County Court. During the course of petitioner's trial, a sworn juror approached Cattaraugus County District Attorney's Office Investigator Stouffer and handed him an envelope containing a note asking Stouffer to intervene on the juror's behalf on a speeding ticket by taking the enclosed letter to Assistant Cattaraugus County District Attorney Leo Murphy and pleading the juror's case. Investigator Stouffer alerted the trial court to this occurrence and the court called the attorneys for both sides and petitioner into chambers to discuss the matter (Record on Appeal at pages 1059-62).

The prosecutor felt that the juror could be left on the jury, while defense counsel requested that the juror be removed because an appearance of impropriety had been created and also because counsel was concerned that the juror had not disclosed his relationship with Investigator Stouffer during jury selection. Without first consulting the juror, the trial court concluded that Mr. Donovan should be discharged and the first alternate seated in his place. The trial judge then told the attorneys and petitioner to leave his chambers and had juror Donovan brought in. After an *in camera* conversation with the juror outside the presence of

petitioner and his attorney, juror Donovan was discharged as a sworn juror. No inquiry was made concerning the circumstances of the juror's communication with Investigator Stouffer and the juror was not questioned concerning his ability to render an impartial verdict (Record on Appeal at pages 1062-74).

In addition to claiming that the failure of the trial court to conduct a probing inquiry of the juror's ability to render an impartial decision in the case violated the procedure to be followed in discharging a sworn juror as set forth in New York Criminal Procedure Law §270.35 and the New York Court of Appeals' requirements announced in People v. Buford, 69 N.Y.2d 290, 514 N.Y.S.2d 191 (1987), petitioner also claimed that the trial court violated his state and federal constitutional right to be present at all critical stages of the criminal proceedings against him (Appendix at pages A-63 through A-66 and pages A-185 through A-189). The premise underlying petitioner's challenge to the court's communication with the sworn juror in the absence of both petitioner and his attorney was the denial of an opportunity for petitioner to assist in his own defense by observing and participating in the examination of the partiality or lack thereof of a sworn juror in whose selection petitioner had a voice and, therefore, an interest in preserving as a jury member if the circumstances so warranted. The Appellate Division, Fourth Judicial Department, rejected petitioner's contentions, concluding:

> Nor did the Court violate defendant's right to be present at a critical stage of trial. A conference leading to the Court's discharge of a sworn juror is not a critical stage of trial at which a defendant must be present. In any event, defendant was present during the entire conference leading to that determination, although not present when the Court informed the juror of his discharge (Appendix at page A-5; citations omitted).

The Appellate Division's determination in this regard is an error of federal constitutional magnitude. As this Court explained in United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482 (1985), an accused has a constitutionally protected right to be present during all critical stages of trial:

> The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. at 105-106, 108, 54 S.Ct. at 332, 333; see also, Faretta v. California, 422 U.S. 806, 819, n.15, 95 S.Ct. 2525, 2533, n.15, 45 L.Ed.2d 562 (1975). The Court also cautioned in Snyder that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U.S., at 115, 54 S.Ct., at 335.

United States v. Gagnon, supra at 526-27, 105 S.Ct. at 1484.

In Gagnon, the Court concluded that the presence of the defendants and their attorneys during the Court's *in camera* discussion with the juror regarding that juror's concern that

defendant Gagnon was sketching portraits of the jury was not a portion of the trial at which defendant's presence was constitutionally required. Characterizing the incident as "a minor occurrence," the Court observed:

> The encounter between the judge, the juror and Gagnon's lawyer was a short interlude in a complex trial; the conference is not the sort of event which every defendant had a right personally to attend under the Fifth Amendment. Respondents could have done nothing had they been at the conference, nor would they have gained anything by attending.

Id. at 527, 105 S.Ct. at 1484-85.

In contrast to Gagnon, in the instant case petitioner could have participated in the conference and unquestionably could have benefited from it. The question to be resolved was whether the sworn juror was, by reason of his communication to the District Attorney's investigator, incapable of presiding as an impartial juror. At issue, therefore, was the continued ability of a juror whom defendant had selected to sit in judgment of his case, to act impartially as a trier of fact.

Thus, the situation presented here is entirely different than the "minor occurrence" addressed in Gagnon. While the defendant's presence during the Gagnon inquiry might have been superfluous in the sense that he could contribute nothing to the proceeding and could gain nothing from being present thereat, petitioner's presence at the inquiry in the trial court below would have been anything but superfluous. Petitioner, had he been present with his attorney, would have had an opportunity not only to hear the juror explain in his own words the events giving rise to a question concerning his impartiality, but also to observe the juror's demeanor during the discussion. Had petitioner's presence been permitted, the accomplishment of these objectives would have

allowed petitioner to factor his observations into an informed decision as to whether the discharge of a juror he had previously selected to sit on his jury was necessary or even desirable. Further, had petitioner been granted the opportunity to participate in an inquiry into the juror's state of mind concerning issues such as fairness and impartiality, petitioner would have at least received the benefit of an opportunity to pose questions of his own concerning these weighty issues through his attorney. Consequently, it cannot reasonably be said that petitioner's presence at this conference would have been superfluous.

Furthermore, the opportunity for petitioner to participate in the conference with the juror would not have been a meaningless exercise because petitioner himself had serious concerns -- which he expressed to the court, about a juror who was sleeping during the presentation of proof. Coincidentally, this juror happened to be the first alternate, who was seated in juror Donovan's place (Record on Appeal at pages 1063-70, 1075). Had petitioner been afforded his right to be present during the court's meeting with juror Donovan, he would have been able to make an informed decision as to whether he wanted Donovan to be removed in favor of someone who might not give the requisite attention to the proof as it came in.

In light of the denial of petitioner's right to be present at all critical stages of trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, petitioner respectfully requests that this Court grant certiorari.

POINT III

THE TRIAL COURT VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY REFUSING TO RECUSE ITSELF FROM THE HEARING ON PETITIONER'S MOTION TO SET ASIDE THE VERDICT

As this Court explained in Bracy v. Gramley, 520 U.S. 901, 117 S.Ct. 1793 (1997), the Due Process Clause of the Fourteenth Amendment "requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id. at 904-05, 117 S.Ct. at 1797 (citations omitted). In petitioner's case, the due process protections of the Fourteenth Amendment which further and make meaningful the Sixth Amendment guarantee of a trial by jury, were denied when the trial judge refused to recuse himself from presiding over a hearing on petitioner's post-trial motion to set aside the verdict on the ground, *inter alia*, that juror misconduct had tainted the verdict.

On September 19, 1997, prior to imposition of sentence but post-verdict, juror Denise Luce hand delivered to the court a letter which reflected her experience as a juror in petitioner's case (Record on Appeal at page 1664). On that same date, the court met with juror Luce outside the presence of petitioner and counsel. During the 45-minute, off-the-record meeting between the court and juror Luce, Luce related to the court her experiences as a juror, including the harassment and extreme pressure she was forced to undergo from other jurors. Ms. Luce explained to the court that she did not believe that there was sufficient evidence to convict petitioner but only changed her vote due to the harassment and pressure from fellow jurors (Record on Appeal at pages 1719, 1820). In her sworn affidavit, Ms. Luce states that she also "discussed several

aspects of the case and jury deliberations" with Judge Himelein (Record on Appeal at page 1661). She further stated that during jury deliberations, two jurors from the Olean, New York area brought into the jury room extra record information which was crucial in determining material issues at petitioner's trial. Specifically, the Olean jurors described the lighting in the area of the crime scene and also stated that they could more accurately describe the size and layout of the restaurant than the photographs which were offered as evidence (Record on Appeal at pages 1659-60).

First, by meeting with juror Luce two days after the jury rendered its verdict, the trial court made itself a witness to her statements regarding jury misconduct. Additionally, the failure of the trial court to have a stenographic record made of the meeting increased petitioner's need to call the court as a witness to testify to juror Luce's statements for the purposes of either establishing or impeaching her credibility concerning the various topics she discussed. Consequently, petitioner's claim that the trial court was a material witness was made in good faith and based on factual circumstances.

Secondly, due to the improper meeting between the court and juror Luce, the trial judge had the ability to dispute Luce's testimony at petitioner's Criminal Procedure Law §330.30 hearing based on her off-the-record statements at the September 19, 1997 meeting with the court. Any perceived conflicts in her testimony could have cast doubt upon her credibility, resulting in the court -- whether consciously or subconsciously -- impeaching Luce's testimony at the hearing or relying upon what she said before rather than what was testified to in open court. Further, based upon the court's off-the-record meeting, the trial judge might already have formulated a determination of juror Luce's veracity on the merits of her claims of jury misconduct. Specifically, prior to Luce's testimony at the CPL §330.30 hearing, the trial court had observed her demeanor and presumably developed an opinion about her honesty and credibility. Moreover, the trial court was required to

pass upon not only Luce's credibility, but also the accuracy of her recollection.

Against this back drop, recusal was necessary. The trial court had significant exposure to the substance of juror Luce's anticipated testimony by virtue of a 45-minute *ex parte* conversation with her during which juror Luce divulged extensive information material to the basis of petitioner's motion to set aside the verdict. Not only did the trial judge become a witness to what juror Luce actually reported concerning jury deliberations, the *ex parte* nature of the meeting between the court and the juror prevented petitioner and his counsel from knowing what was said at the meeting and how it was said, consequently making them unable during the course of Ms. Luce's hearing testimony to determine whether certain events crucial to her credibility occurred (e.g., adding information to her testimony which was not previously disclosed to the trial court; omitting information previously disclosed at the *in camera* conference; deviating from her previous description of events; testifying with a significantly different demeanor than she possessed during her meeting with the court; misapprehension by the court as to what Ms. Luce actually said during their private conversation.

Petitioner was, and still is, unaware of what off-the-record information the trial court may have relied upon in consideration of juror Luce's hearing testimony. Consequently, petitioner was denied any opportunity to effectively address the prejudicial impact of the interplay of seemingly improper influences during the court's deliberative process.

The Appellate Division's conclusion that there was "no valid basis" for recusal is clearly erroneous (Appendix at page A-5). By refusing to recuse himself, the trial judge became an unsworn witness in the proceedings below whose recollection potentially or in fact had a substantial impact on the weight to be accorded to juror Luce's hearing testimony, wholly unbeknownst to petitioner. As the Sixth Circuit Court of Appeals observed in Price Bros. Co. v.

Philadelphia Gear Corp., 629 F.2d 444 (1980), cert. denied, 454 U.S. 1099, 102 S.Ct. 674 (1981):

> The problem attendant to a judge having personal knowledge of the facts is that he may thereby be transformed into a witness for one party. . . . Whether, in a bench trial, a judge can avoid an involvement destructive of impartiality where he has personal knowledge of material facts in dispute is a question that cannot be answered satisfactorily and, therefore, a judge should recuse himself in such circumstances.

Id. at 447 (citations omitted).

Petitioner submits that the Due Process Clause requires no less than the recusal of a judge who has obtained off-the-record knowledge of facts material to the issue in dispute. Accordingly, petitioner respectfully requests that this Court grant a writ of certiorari.

Further, petitioner maintains, as it did below, that the trial court's off-the-record, *ex parte* meeting with juror Luce constituted a stage of the proceedings at which petitioner had a constitutional right to be present. United States v. Gagnon, supra; Snyder v. Massachusetts, supra (Appendix at pages A-197 through A-200). It is axiomatic that an accused has an absolute right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. at 105-06, 54 S.Ct. at 332. Had petitioner and his attorney been made part of this meeting, not only would they have obtained first-hand knowledge of the substance of juror Luce's concerns instead of being forced to imperfectly reconstruct the communications between Ms. Luce and the trial court at a later date, but petitioner would also have been in a position to assist his attorney in exploring the issues raised by Ms. Luce by reference to his own recollection of the voluminous, and often conflicting,

testimony presented at trial. Petitioner's presence would not have been "superfluous," United States v. Gagnon, supra, in that he would have been able to use his evaluative skills to assess Ms. Luce's description of events during the course of trial, including the extent to which extra-record information may have been introduced into the juror's deliberations. Since the *ex parte* conversation between the juror and the trial court occurred prior to sentencing and the entry of judgment -- at a time when petitioner was authorized pursuant to New York Criminal Procedure Law §330.30 to file a motion to set aside the verdict on the ground of juror misconduct -- petitioner submits that this constitutes a critical stage of the criminal proceedings against him which implicated "the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, supra. Petitioner therefore requests that this Court grant certiorari to remedy this constitutional error.

POINT IV

JUROR MISCONDUCT DURING DELIBERATIONS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

Petitioner filed a CPL §330.30 motion alleging, *inter alia*, that jurors injected their own personal knowledge of the crime scene and of the participants in the fight into the deliberations. In particular, jurors Denise Luce and Ruth Painter testified that they had repeatedly argued during deliberations that the testimony as to who was involved in the altercation in the parking lot was insufficient given that the incident occurred at night and that the lack of lighting in the area would have prevented witnesses from specifically identifying petitioner. Significantly, there was no testimony offered at trial as to the extent or degree of illumination provided by the lighting in and around the premises of the East Side Pizzeria (Record on Appeal at pages 1659-60, 1662, 1820-21, 1912).

To counter their contentions, two jurors from Olean informed the jury that they were both familiar with the parking lot area and that it was all very well lit at night. Further, in response to the assertion by jurors Luce and Painter that it would have been difficult for Pam Brochu to have heard petitioner make a disputed statement from across the restaurant because of the restaurant's size and the numerous patrons engaging in conversations therein, the Olean jurors responded that they had both been to the restaurant and that it was not as big as the photographs which had been introduced into evidence made it appear (Record on Appeal at pages 1660, 1662-63, 1822-25, 1830-32, 1904-06).

The two jurors from Olean also interjected into deliberations the fact that the tables inside the restaurant were not arranged in the fashion depicted in the photographs which were marked into evidence. Finally, one of the Olean jurors informed the rest of the jury that she went to church with John Reynolds's sister and that petitioner's group, which she called the "Portville Boys," were good boys from good families, well educated, and should have known better than to get into the fight. She also stated that it was going to be difficult to face petitioner's family at church (Record on Appeal at pages 1660, 1663, 1721, 1822-25, 1831-34).

On appeal to the Appellate Division, Fourth Judicial Department, petitioner contended that the two Olean jurors had become unsworn witnesses against him by injecting extra-record facts into the jury deliberations, thereby violated petitioner's Sixth Amendment rights to a fair trial and to confront witnesses against him (Appendix at pages A-77 through A-84 and A-201 through A-202). In rejecting petitioner's challenge, the Appellate Division stated merely that "[t]he evidence at the hearing established that the jurors were not subjected to any improper outside influence" (Appendix at pages A-5 through A-6).

Petitioner submits that the evidence adduced during the hearings on his CPL §330.30 motion sufficiently established that

juror misconduct prejudiced his right to a fair trial. Here, the extra record facts were introduced by the Olean jurors for the express purpose of countering arguments relied upon by jurors Luce and Painter, who believed that the evidence was insufficient to sustain a conviction. Additionally, the extra record facts concerned factual issues which went to the heart of the case. Obviously, the eyewitnesses' ability to identify the participants in the fight was of paramount importance and any information which was interjected into deliberations concerning the sufficiency of the lighting during night time hours played a crucial role in refuting the dissenting jurors' opinions. Additionally, the CPL §330.30 hearing testimony established that jurors Luce and Painter were concerned about the ability of patrons within the restaurant to hear comments made other customers in various parts of the restaurant, but their concerns were assuaged by the Olean jurors' assurances that, based on their own personal knowledge of the inside of the restaurant, the area was small enough to permit such comments to be overheard.

In essence, these jurors became unsworn witnesses against petitioner. The Olean jurors interjected their own knowledge of the restaurant premises and lighting conditions into deliberations in an effort to fill gaps left in the proof by the prosecution. Petitioner was obviously unaware that this was occurring and did not have an opportunity to cross examine these unsworn witnesses or to present proof in his case in chief concerning the accuracy of the extra record facts brought into the deliberations by the Olean jurors. Moreover, it is apparent that at least one of the jurors expressed the opinion to the rest of the jury that, based on her personal familiarity with the "Portville Boys", petitioner and his acquaintances should be held to a higher standard of conduct given their character and education.

While petitioner recognizes that not every verdict may be impeached on these grounds, "whenever, through the introduction of significant extra record facts, a juror becomes an unsworn witness testifying to critical information without defendant being

afforded his right to confrontation or cross examination guaranteed by the Sixth Amendment, the constitutional rights take precedence over New York's policy against impeachment of jury verdicts." People v. Edgerton, 115 A.D.2d 257 (4th Dept. 1985). The fact that the extra record information comes from jurors rather than strangers is of no moment. People v. Edgerton, supra; see also United States ex rel. Owen v. McMann, 435 F.2d 813, 820 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

Petitioner respectfully submits that his Sixth Amendment right to be aware of and to confront witnesses who offer evidence against him was prejudiced by the introduction of extra-record facts by jurors during deliberations. Consequently, petitioner requests that this Court grant certiorari to review the verdict in this case.

POINT V

PETITIONER'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Before the Appellate Division, Fourth Judicial Department, petitioner maintained that the evidence adduced at trial was not legally sufficient (Appendix at pages A-88 through A-91). The Appellate Division concluded that petitioner's conviction for manslaughter in the second degree was supported by legally sufficient evidence (Appendix at pages A-3 through A-4). Petitioner was denied leave to appeal the Appellate Division's determination in this regard to the New York State Court of Appeals (Appendix at pages A-1 and A-236 through A-238).

Petitioner contends that, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. See, Jackson v. Virginia, U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); see also, People v. Wong, 81 N.Y.2d 600, 608 (1993) [cited by the Appellate Division, Fourth Judicial Department]. As noted at length in the Statement of the Case and in the discussion concerning the Appellate Division's misapprehension of the nature of circumstantial evidence, not only was the trial devoid of any proof, direct or circumstantial, establishing that petitioner either caused the death of Kevin King himself or importuned others to do so, the prosecution witnesses themselves gave testimony which bolstered appellant's claim of innocence.

Accordingly, petitioner respectfully submits that this Court should grant certiorari to review the judgment of the New York State courts with respect to the sufficiency of the evidence.

CONCLUSION

Petitioner respectfully submits that this Court should grant his petition for a writ of certiorari due to the numerous violations of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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